Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
	)	

COMMENTS OF CBEYOND COMMUNICATIONS, LLC., GLOBALCOM, INC., AND MPOWER COMMUNICATIONS CORP.

Cbeyond Communications, LLC., GlobalCom, Inc., and Mpower Communications, Corp. ("Commenters") file these comments in the above-captioned proceeding.[1] Commenters limit these initial comments to several key issues.

I. IP DOES NOT JUSTIFY DEREGULATION OF INCUMBENT BOTTLENECK FACILITIES

A. Incumbents Possess Bottleneck Facilities Justifying Regulation

Commenters will not for purposes of these initial comments repeat the numerous filings that have been made in other proceedings demonstrating that incumbents possess bottleneck facilities, especially the loop.[2] Apart from this substantial evidence, Commenters experience is that there are no alternatives to incumbent loop facilities that can be used by CLECs to obtain access to customers, especially small business customers. It is simply not economically feasible for CLECs to construct competitive loops to any but the very largest customers, and even then it is not always feasible.

Because incumbents control access to customers, they possess market power in provision of a host of services, and have the ability, absent regulation, to harm

---

[1] *In the Matter of IP-Enabled Services,* WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. Mar. 10 2004) ("*NPRM*").
[2] *See, e.g.* evidence cited at fn 859 *Triennial Review Order*, 18 FCC Rcd, 16798 (2003).

competitors by denying reasonable and nondiscriminatory access to loops and other bottleneck facilities. For this reason, the Commission must require that incumbents provide reasonable access to bottleneck facilities notwithstanding that incumbents may also use their own bottleneck facilities to provide IP-enabled services.

B. IP Does Not Eliminate Bottleneck Facilities

Unfortunately, incumbents are likely to attempt to use this proceeding as a vehicle to distract the Commission from addressing the legitimate questions raised by IP-enabled services by advancing the fiction that IP somehow eliminates their bottleneck control of loops and other bottleneck facilities. SBC has already filed a petition seeking sweeping deregulation of any incumbent facilities touched by IP.[3]

The *NPRM* in this proceeding notes the potentially broad scope of this proceeding and seeks comment on appropriate ways to better identify the issues and services that the Commission should address. As a first step in that direction, Commenters recommend that the Commission make clear that it will not permit ILECs in this proceeding to rehash issues that are being addressed elsewhere such as whether incumbents possess market power in the provision of broadband services[4] or whether incumbent broadband facilities should be reclassified as subject to Title I.[5] While these questions should be answered in the negative, IP is essentially irrelevant to them because it does not affect whether incumbents control access to customers via possession of bottleneck facilities.

SBC makes the false claim that IP-enabled networks are separate from the

[3] Petition for Declaratory Ruling filed by SBC Communications, Inc. February 5, 2004. ("SBC IP Platform Petition").
[4] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, released December 20, 2001.
[5] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, 17 FCC Rcd 3019 (2002).

existing circuit switched network.[6] In fact, however, IP capability is for the most part a software upgrade to the switching fabric of the network. Even assuming that there were not a competitive necessity for CLECs to obtain access to these incumbent IP switching upgrades, these upgrades would not affect the bottleneck nature of loop and other transmission facilities. Further, even assuming that IP networks would "enable non-facilities based providers of all types to offer services over the networks of others,"[7] this would not obviate the need for competitive access to the underlying incumbent bottleneck facilities by CLECs. As the Commission has noted, the "Free World Dialup" product offered by pulver.com and the Vonage products are "bring your own broadband" services in that they require the subscriber to first have a broadband connection to the Internet.[8]

C. CLECS Are the Innovators

The Commission should also assure that CLECs are able to obtain reasonable and nondiscriminatory access to incumbent bottleneck facilities used by incumbents or others to provide IP-enabled services, because BOCs are not the most efficient or innovative users of their own networks. BOCs are slow to offer innovative services for rational business reasons. First, they must move cautiously in making significant network changes given the size and scope of their monopoly networks. Second, they are reluctant to introduce new services that cannibalize their own higher-priced legacy services.

VOIP is merely the latest example of BOCs' slowness to innovate. Independent VOIP providers offer voice service to consumers at considerable savings in comparison

[6] SBC IP Platform Petition, p. 10.
[7] *Id*.
[8] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 (rel. Feb. 19, 2004) at para. 5.

to traditional incumbent services and with more features, such as management of long distance calls from a website. BOCs are announcing plans to offer consumers these benefits that undercut their traditional voice offerings only because of competitive pressure. They would have no incentive to do so otherwise, and without competitors in the market, would only do so at much higher prices than those charged by new entrants.

Similarly, BOCs did not use DS-1 capable loops to provide integrated packages of voice and data services that undercuts their own more expensive DS-1 data services until competitive pressure from CLECs required them to do so. CLECs were the first to offer DSL services. As stated in its 1999 Economic Report of the President's Council of Economic Advisors:

> ([t]he incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from cable television networks delivering similar high-speed services, and the entry of new direct competitors attempting to use the local competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.

Further, while BOCs will seek to use the Internet as a justification for deregulation, the Internet was developed by CLECs and in spite of incumbent efforts to thwart its development such as imposition on ISPs of interconnection, access, and other charges.

Accordingly, regardless of whatever decision the Commission makes concerning the regulatory treatment of incumbent and non-incumbent provided IP-enabled services, the Commission must assure competitive access to incumbent bottleneck facilities.

II. A SERVICES VS. FACILITIES DISTINCTION, OR A LAYERED APPROACH MAY BE USEFUL

Commenters agree with the approach apparently taken by the Commission in the *NPRM* of distinguishing the facilities used to provide an IP-enabled service from the IP-

enabled services riding over them. This analytic approach would permit the Commission to choose an appropriate regulatory approach for the facilities, including substantial deregulation, while continuing to regulate incumbent bottleneck facilities.

The Commission asked in the *NPRM* whether regulation by "layers" would be appropriate.[9] While Commenters reserve final judgment to a later stage in this proceeding, a "layered" approach may also be useful for regulation/deregulation of broadband facilities and IP-enabled services provided over those broadband facilities.[10] This could accommodate application of appropriate regulatory requirements to the bottleneck physical layer possessed by incumbents while affording flexibility and fine tuning for regulation of higher layers. Commenters will review initial comments describing this approach and make further recommendations to the Commission.

III. CLECS ARE TELECOMMUNICATIONS CARRIERS

Commenters urge the Commission to proceed cautiously in applying the statutory definitions of "telecommunications service" and "information service" to IP-enabled services. In this regard, the *NPRM* correctly recognized that there may be various flavors and categories of VOIP and wisely foreshadowed a decision in which IP-enabled services are treated differently for some purposes. Commenters have no doubt that the Commission ruled correctly in determining that the VOIP service of Pulver.com is an information service,[11] and that the Commission should promptly grant the Vonage

[9] *NPRM* at para. 37.
[10] *See* MCI *ex parte*, WC Docket 04-36, March 29, 2004.
[11] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 (rel. Feb. 19, 2004).

petition.[12]

However, CLECs use IP to provision their telecommunications service offerings. Cbeyond and other CLECs, for example, use IP technology internal to their networks efficiently to provision affordable packages of voice telecommunications and Internet access service over their own facilities. These CLECs fully comply with all regulatory requirements, pay access charges on voice traffic, and make all requisite universal service contributions. As CLECs, Cbeyond and other CLECs offer E911 access, local number portability, and CALEA compliance.

Commenters stress that whatever decision the Commission makes with respect to other types of providers of IP-enabled services, the Commission must preserve the telecommunication status of CLECs that use IP-enabled services. Commenters intend to work closely with the Commission in this proceeding to assure that the Commission crafts outcomes that do not inappropriately affect the regulatory rights and status of CLECs.

Respectfully submitted,

Andrew D. Lipman
Patrick J. Donovan
Michael W. Fleming
Swidler Berlin Shereff Friedman L.L.P.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7645 (Facsimile)

Dated: May 28, 2004

[12] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sep. 22, 2003).